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No. 06-972

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN M. GIOVANELLA,

Petitioner,

v.

TOWN OF ASHLAND
CONSERVATION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

The Petitioner's formulation of the issue for review is misstated. The question that is presented in the Petition, taking into account the facts and circumstances of this case, is more accurately stated as follows:

Did the lower court engaged in an appropriate analysis regarding the relevant parcel for a takings claim, where the court's analysis began with a presumption of aggregation based on contiguous, commonly-owned parcels of real estate, and included consideration of multiple factors to rebut the presumption, including whether the parcels were acquired at the same time; whether the purchase and financing of the parcels were linked; the timing of development; whether the land is put to the same use; whether the owner intended to use the property as one economic unit; and the treatment of the property under State law?

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STATEMENT OF THE CASE

The Petitioner's statement of the facts contains significant inaccuracies. So that this Court has a complete view of the facts in this case, the following statement is presented.

A. Factual Background

On March 31, 1999, John M. Giovanella ("Petitioner") purchased land in the town of Ashland (the "Town") for $130,000. Pet. App. A-3. The property consisted of over 34,500 square feet, and had a wetland in the northwest corner and a single-family home on the southern portion. Pet. App. A-3.

About three to six months after purchasing the land, the Petitioner learned that a previous owner had divided the property into two lots. The lots were assessed separately for taxes and had different addresses. Pet. App. A-3. The single-family home was on Lot 2, while the wetlands was on Lot 1. Pet. App. A-3. After learning this information, the Petitioner decided to build a new house on Lot 1. Pet. App. A-3-4.

In December 1999, the town adopted a wetlands protection bylaw. Pet. App. A-4. When the Petitioner subsequently applied for a permit to build on Lot 1, the town's Zoning Board of Appeals granted a special permit, subject to the condition that the Petitioner obtain an order of conditions from the Town's Conservation Commission (the "Commission"). Pet. App. A-4.

The Petitioner filed with the Commission a notice of intent to build on Lot 1. Pet. App. A-4. The Commission

considered two different plans that the Petitioner presented. However, citing concerns with pollution and loss of wildlife habitat resulting from the disturbance during construction, the Commission denied the Petitioner's application for an order of conditions. Pet. App. A-4-5.

More than a year after the Commission had rejected his application for an order of conditions, the Petitioner sold Lot 2 for $319,000. Pet. App. A-5. During the time that Lot 2 was on the market, at least one individual expressed an interest in purchasing Lots 1 and 2 together. Pet. App. A-5. However, the Petitioner decided to sell Lot 2 separately, in the hopes of eventually being able to build on Lot 1. Pet. App. A-5.

After the sale of Lot 2, the Petitioner hired an appraiser, who concluded that by itself, Lot 1 had no value. Pet. App. A-5. The appraiser also concluded that Lot 1 would have value to an abutter were it not for the tax liability imposed by the Town. Pet. App. A-5 n.3. The tax liability was based on the Town assessor's determination that Lot 1 was developable. Pet. App. A-5 n.3. According to the Petitioner's appraiser, should Lot 1 be reassessed as an undevelopable lot, it would have a value of $3,000 to $8,000 to an abutter. Pet. App. A-5 n.3.

B. Judicial Proceedings

Following the Commission's denial of the Petitioner's application for an order of conditions, the Petitioner filed an appeal with the Massachusetts Superior Court, seeking an annulment of the Commission's decision, or damages for what he contended was a regulatory taking under the Fifth Amendment to the United States Constitution. The Superior Court upheld the Commission's decision, and

further held that the Petitioner's takings claim must fail because, using the contiguous, commonly-owned property as the relevant parcel, the Petitioner had failed to show sufficient economic harm.

The Petitioner appealed this ruling, and the Massachusetts Supreme Judicial Court granted his application for direct appellate review. The Supreme Judicial Court, noting that determining the bounds of the "relevant parcel" was a fact-intensive inquiry, affirmed the decision of the lower court, holding that it was appropriate to consider the Petitioner's contiguous, commonly-owned property as one unit. The decision of the Supreme Judicial Court is consistent with the takings analysis of this Court, the federal circuit courts, and the courts of other states.

REASONS FOR DENYING PETITION

The Petitioner contends that there is a conflict among the lower federal and state courts, noting that in some cases courts aggregate contiguous, commonly-owned property for the purpose of a takings analysis, while in other cases the courts do not. In fact, a review of the cases that the Petitioner cites reveals that the lower courts each engage in a consistent and case-specific, factual analysis when deciding these cases, and that the case-specific nature of a takings analysis explains the different outcomes.

Furthermore, even were this Court inclined to review the general issue that the Petitioner raises, this case is not the appropriate vehicle for such review. The facts of this case, wherein the Petitioner purchased property believing it to be one lot, with no intention of further development

and with no economically-backed plan to do so, and where the Petitioner could have sold the regulated portion of his property to an abutter for, according to his own appraiser, between $3,000 and $8,000, this does not present a compelling case for reviewing the issue of how to define the "relevant parcel."

For all of these reasons, the petition for certiorari should be denied.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR AMONG THE STATE COURTS

The Petitioner asserts that there is a conflict among the circuit courts and state courts regarding what the relevant parcel of property is for purposes of analyzing a regulatory taking claim. Contrary to the Petitioner's assertions, however, there is no such conflict among the circuits or state courts, nor with prior rulings of this Court. Indeed, a review of the cases that the Petitioner cites reveals remarkable consistency of analysis. The Petitioner's characterization appears to result from observing the varying outcomes that courts have reached regarding whether to aggregate contiguous, commonly-owned parcels of land. However, such differing outcomes are to be expected, because the inquiry calls for case-specific, factual determinations, pursuant to the guidelines articulated by this Court.

A. This Court's Takings Jurisprudence Establishes That Regulatory Takings Cases Require Case-Specific Factual Inquiries, Including The Identification Of The "Relevant Parcel"

This Court has consistently stated that regulatory takings cases require "complex factual assessments of the purposes and the economic effects of government actions." *Tahoe-Sierra Preservations Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002). The "test for regulatory taking requires [the Court] to compare the value that has been taken from the property with the value that remains in the property," thus requiring a determination of the relevant parcel of property, sometimes referred to as the "denominator" of the fraction. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 497 (1987).

This Court has also made clear that there is no *per se* rule defining the relevant parcel simply as the property interest subject to the regulatory restriction: "defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [restriction] would become a total ban. We have consistently rejected such an approach to the 'denominator' question." *Tahoe*, 535 U.S. at 331.

As this Court has stated, "in regulatory takings cases, we must focus on 'the parcel as a whole.'" *Id.* Takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Pennsylvania Central*

Transportation Co. v. City of New York, 438 U.S. 104, 130-31 (1978).

This Court's consistent position that a takings analysis focus on the "parcel as a whole" is mandated precisely because of the concern expressed in *Tahoe* above: to allow an owner to define the relevant parcel based on the challenged regulation will *always* result in the conclusion that there has been a taking. *Tahoe*, 535 U.S. at 331. Nonetheless, the Petitioner, through the Pacific Legal Foundation, seeks to have this Court reconsider the relevant parcel issue in hopes of persuading this Court to make the test exactly that. This would set a standard whereby the impact of a challenged regulation essentially define the relevant parcel. However, "not all regulations that affect private property require the government to purchase the land in order to regulate its permissible uses. Indeed, the government would quickly bankrupt itself if, every time it made a rule that affected private property rights, it had to purchase the property." *Machipongo Land and Coal Co. v. Commonwealth*, 799 A.2d 751, 763-764 (Pa.), *cert. denied*, 537 U.S. 1002 (2002), (citing *Keystone*, 480 U.S. at 491). As was noted by the Supreme Court of Colorado, in *Animas Valley Sand and Gravel, Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001): "Were we to accept [Petitioner's] position that a court should evaluate the effect of a regulation with respect to only one segment of the parcel, virtually any land use regulation would effect a taking if the landowner defined the relevant parcel small enough." *Id.* at 69.

Not only is this inadvisable because of the inevitable result that every challenged regulation under such an analysis would be a taking, but such a reexamination of the relevant parcel issue is simply unnecessary. This

Court's precedent provides clear guidance that the state courts and circuit courts of appeal have consistently applied. That precedent requires the relevant parcel be the "parcel as a whole" and that such determination be guided by a fact-sensitive inquiry into the nuances of each case.

The Court's reference to the "parcel as a whole" and the "property in its entirety" does not, of course, resolve the specific factual inquiry regarding what constitutes the whole parcel or the entire property. However, this language is part of the guidance this Court has provided for that inquiry. Expanding on these phrases, the Court has stated, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Keystone*, 480 U.S. at 497 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

Significantly, this case-specific factual inquiry of the relevant parcel must be made with reference to the same factors upon which a takings claim is analyzed. The Court stated in *Penn Central*, 438 U.S. at 124:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

This Court stated in *Tahoe* that "[o]ur polestar . . . remains the principles set forth in *Penn Central* and the other cases that govern partial regulatory takings. Under

these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." *Tahoe*, 535 U.S. at 336.

With this guidance, lower courts determine the relevant parcel by conducting case-specific inquiries that identify the relevant parcel that is most appropriate under the particular facts within the context of their examination of the regulation's economic effect on the landowner; the extent to which the regulation interferes with reasonable investment-backed expectations; and the character of the governmental action.

B. The Lower Courts Consistently Apply The Same Factors

1. The Federal Court Cases Cited By The Petitioner Are Not In Conflict

The Petitioner asserts that with regard to determining the relevant parcel, there is a conflict among the Circuits. No such conflict is present in these decisions, however, unless one assumes, contrary to common sense, that there must be a *per se* rule requiring aggregation or non-aggregation in every case, regardless of the specific facts involved. A case-by-case, factual analysis inherently presumes that some cases will properly result in aggregation and others not. The proper test of consistency is not whether aggregation does or does not occur in every case, but whether the courts have applied an appropriate, reasoned analysis to decide the issue. In fact, they have.

An examination of the Federal Circuit cases that the Petitioner cites reveals the basic framework for the case-by-case, fact-intensive inquiry in which each court dealing with a relevant parcel issue must engage. *Palm Beach*

Isles Assocs. v. United States, 208 F.3d 1374 (Fed Cir. 2000), *cert. denied*, 126 S. Ct. 348 (2005); *Forest Properties, Inc. v. Washington County*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 528 U.S. 951 (1999); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

In *Loveladies*, the plaintiff developer had purchased 250 acres in 1958, and thereafter developed or sold 199 of them. Subsequently, section 404 of the Clean Water Act was enacted. Fifty of the plaintiff's remaining undeveloped 51 acres were under water. Under the Act, the plaintiff was required to obtain permits from the State and from the Army Corps of Engineers to create landfill in order to develop that land. Plaintiff eventually agreed to a compromise with the State, by which only 12.5 of the 51 acres could be developed. The Corps of Engineers, however, denied a permit. Plaintiff brought a takings claim.

The *Loveladies* court rejected plaintiff's argument that there should be a bright-line rule that the relevant parcel is deemed to be limited to the parcel for which the permit was applied. Noting that "[o]ur precedent displays a flexible approach, designed to account for factual nuances," the court stated that "[t]hese factual nuances include consideration of the timing of the transfers in light of the developing regulatory environment." *Loveladies*, 28 F.3d at 1181. Examining the factual background, the court concluded that the 199 acres developed or sold before the regulatory restrictions existed would not be included in the relevant parcel. The court further concluded that the 38.5 acres that plaintiff had committed to the State in exchange for the approval to develop 12.5 acres also would not be included in the relevant parcel, because that land held no further value to the plaintiff. The court thus concluded that the remaining 12.5 acres was the relevant

parcel, and accepted the trial court's finding that without a permit its value was de minimus.

The Federal Circuit conducted a similar analysis in *Palm Beach Isles*, 208 F.3d 1374. The plaintiff bought 311.7 acres in 1956, of which 261 acres was "upland" property on one side of a road, whereas the remaining 50.7 acre parcel on the other side consisted of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land. The two parcels were subject to different zoning requirements. In 1968, the plaintiff sold the upland property. Twenty years later, in 1988, the plaintiff sought permits to dredge and fill the submerged land. The State denied the permit, and plaintiff brought a taking claim. In determining the relevant parcel, the court noted, "As we said in *Loveladies Harbor*, '[o]ur precedent displays a flexible approach, designed to account for factual nuances.'" *Palm Beach Isles*, 208 F.3d at 1381 (quoting *Loveladies*, 28 F.3d at 1181). The court observed that plaintiff had never planned to develop the two parcels as a single unit, that the purchase and sale of the 261 acres occurred before the environmental restrictions were adopted, and that the development of the upland property "was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed." *Id.* at 1381. The court thus held that the relevant parcel was the 50.7 acres of wetlands and submerged lake bed.

Another Federal Circuit case cited by the Petitioner is *Forest Properties*, 177 F.3d 1360, in which the court applied the same case-specific analysis that can be seen in the *Loveladies* and *Palm Beach Isles* cases. *Id.* at 1365. The court said that the analysis "requires courts to focus on the expectations of the claimant with regard to the property," and "[w]here the developer treats legally separate parcels as

a single economic unit, together they may constitute the relevant parcel." *Id.* Here, the court said, it was understood from the beginning that "the two portions would be developed as a single unit." *Id.*

In support of his contention that there is a conflict among the circuit courts, the Petitioner erroneously asserts that the District of Columbia Circuit's decision in *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), is in conflict with the foregoing Federal Circuit decisions. In fact, this decision applies remarkably similar reasoning. In *District Intown Properties*, the plaintiff purchased in 1961 a property in the District of Columbia consisting of an apartment building and adjacent lawns. Unlike *Palm Beach Isles* and *Loveladies*, in *District Intown Properties*, the plaintiff made no immediate effort to develop, sell or separate any part of the property. Instead, 27 years later, the plaintiff subdivided the property into nine lots, one being the apartment building and the other eight being portions of the lawn. The plaintiff sought a permit to build townhouses on each of the eight lawn lots. Because the property was across the street from the National Zoo, the proposed development was subject to review by the District of Columbia Commission on Fine Arts. The Commission denied the permit, and the plaintiff brought a takings claim.

The plaintiff argued that the relevant parcel should be limited to the eight lawn parcels, for which a permit was sought, and should not include its contiguous existing apartment building. The plaintiff in *Loveladies* had similarly argued that the relevant parcel should be limited to the property for which the permit was requested, but the Federal Circuit rejected that argument in favor of a

case-specific, factual analysis. The District of Columbia Circuit did the same. *District Intown Properties*, 198 F.3d at 880.

In *District Intown Properties*, the district court concluded that the relevant parcel included the apartment lot as well as the lawn lots. On appeal, the circuit court agreed, acknowledging, with approval, the case-specific factual analysis the district court had applied:

> The District Court used several factors to determine the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases.

Id. (internal citations omitted). The court further noted that the apartment and lawn property were spatially and functionally contiguous and had been treated by the plaintiff as a single indivisible property for more than 25 years.

Significantly, petitions for certiorari have been filed in three of the circuit court cases discussed above, and this Court has denied those petitions each time. *Palm Beach Isles*, 208 F.3d 1347, *cert. denied*, 126 S. Ct. 348 (2005); *District Intown Properties*, 198 F.3d 874, *cert. denied*, 531 U.S. 812 (2000); *Forest Properties*, 177 F.3d 1360, *cert. denied*, 528 U.S. 951 (1991). Although this Court's decision to deny a petition for certiorari does not elucidate the reasons for such denial, it is telling that each of these three circuit court cases involved courts conducting a case-based, factual analysis, examining the very same factors

that the Massachusetts Supreme Judicial Court examined below. Pet. App. A-11-12, A-16-17.

Other lower federal courts have applied a nearly identical analysis, evidencing that this Court has provided consistent and appropriate guidance regarding the factors to be considered in determining the relevant parcel. For example, in *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), cited by the Petitioner as counter to the District of Columbia circuit, the court stated that in determining the relevant parcel, it would consider: "(1) physical contiguity; (2) unity of ownership; and (3) unity of use." *Id.* at 369. The court went on to note that "[t]hese criteria are not absolutely inflexible. They are working rules courts have adopted to do substantial justice in eminent domain proceedings." *Id.* The court then proceeded with its case-specific factual analysis. Similarly, in *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-319 (1991), the Court of Federal Claims discussed the determination of the relevant parcel in similar terms of case-specific factual analysis:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of the remaining lands, the value of the remaining lands, and no doubt many others, would enter the calculus.

In summary, the circuit courts determine the relevant parcel by engaging in nearly identical case-specific factual analyses that is "designed to account for factual nuances." *Loveladies*, 28 F.3d at 1181. The Petitioner has failed to demonstrate that there is any conflict among the circuits.

2. The State Court Cases Cited By Petitioner Are Not In Conflict

The Petitioner's assertion that there is a conflict among the state courts regarding the determination of the relevant parcel is based on the same erroneous premise that different outcomes means an inconsistent analysis. As seen from the discussion of circuit court cases above, this assumption is faulty. The state court cases, like those of this Court and the federal circuit courts, routinely apply a case-specific factual analysis, as is reflected in the cases the Petitioner cites.

For example, citing to the various factual considerations set forth in *Ciampitti*, *supra*, the Supreme Court of Michigan has stated that "[d]etermining the size of the denominator parcel is inherently a factual inquiry." *K & K Construction, Inc. v. Dept. of Natural Resources*, 575 N.W.2d 531, 536 (Mich. 1998). A similar factual analysis was made in *Karam v. Dept. of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *cert. denied*, 528 U.S. 814 (1999). There, the court noted that although contiguous commonly-owned land is often treated as a single parcel for takings analysis, factual examination can result in treating the property as separate parcels. The court cited various cases involving large tracts of property that had been segmented into smaller parcels for development at different times, where "either because of the configuration of the property or its history, the divided parcels [were] considered as separate and distinct entities or units." *Id.* at 1228. The court discussed various factual issues and concluded that, "*[r]ecognizing the fact sensitive question before us*, we are convinced that the adjoining upland and riparian lands must be considered a single property unit." *Id.* (emphasis added).

The Supreme Court of Ohio adopted the very same approach:

> Although contiguous tracts of property are typically considered as a single relevant parcel for purposes of a takings analysis, factual nuances may dictate a more flexible approach. . . . These factual nuances may include the claimant's investment-backed expectations.

State ex rel. R.T.G., Inc. v. State of Ohio, 780 N.E.2d 998, 1009 (Ohio 2002) (citations omitted). The California cases cited by Petitioner also apply the same case-specific factual analysis to determine the relevant parcel. For example, in *Twain Harte Assocs., Ltd. v. County of Tuolumne*, 265 Cal. Rptr. 737, 745 (Cal. App. 1990), the court stated that "it seems obvious the question of whether two related parcels will be treated as one . . . [is] necessarily bound up in the 'ad hoc factual' evaluation which constitutes the test for determining a taking." *See also Aptos Seascape Corp. v. County of Santa Cruz*, 188 Cal. Rptr. 191, 197 (Cal. App. 1982) (stating that whether there are two separate parcels for taking purposes is a question of fact); *accord Bevan v. Brandon Township*, 475 N.W.2d 385, 396-397 (Mich. 1991), *cert. denied*, 502 U.S. 1060 (1992) (concluding that artificial legal devices, such as tax identification numbers, are outcome determinative in the relevant parcel inquiry).

Similarly, in *Machipongo Land and Coal Co. v. Commonwealth*, 799 A.2d 751 (Pa. 2002), the Pennsylvania Supreme Court noted that "a variety of factors for defining the relevant parcel should be considered. . . . These factors would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a

single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environments; the owner's investment backed-expectations; and, the landowner's plans for development." *Id.* at 768-769. This fact-intensive analysis is the one that each lower court facing a regulatory takings issue applies.

The Petitioner cites a recent decision of the Supreme Court of Idaho, *Couer d'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006), claiming this case "illustrates the divide" between the states on the issue of how to define the relevant parcel for a takings case. In fact, the *Simpson* case is again a perfect illustration of a court engaging in the consistent case-specific, factual analysis that is required to determine the relevant parcel. The *Simpson* court noted that determining the relevant parcel requires the consideration and weighing of numerous factors, and that "the relative weight of any one factor will necessarily depend on the facts developed. . . ." *Id.* at 321. Some of the factors the *Simpson* court suggests are relevant include transfers of ownership, whether the same or different restrictions apply to the property, the extent to which the property was intended to be developed as a whole, the independent economic viability of the portions, and whether the portions of the property are separated by a road or way. *Id.* at 320-323. After spending a number of pages expounding on these factors, the *Simpson* court stated that its analysis was provided for the guidance of the district court, which ultimately would have to weigh the facts and make a determination based on the evidence before it on remand. *Id.* at 324.

Again, as was true with the circuit court of appeals decisions regarding the relevant parcel, this Court has

denied certiorari in three of the state court cases discussed above. *Machipongo Land and Coal Co. v. Commonwealth*, 799 A.2d 751 (Pa.), *cert. denied*, 537 U.S. 1002 (2002); *Karam*, 705 A.2d 1221, *cert. denied*, 528 U.S. 814 (1999); *Bevan*, 475 N.W.2d 37, *cert. denied*, 503 U.S. 1060 (1992). In each of these cases, the state courts engaged in an appropriate, fact-intensive analysis in order to determine what the relevant parcel was with respect to the specific factual nuances of the case before it. The same is true of the Massachusetts Supreme Judicial Court's decision below.

3. The Massachusetts Supreme Judicial Court Applied The Same Case-Specific Factual Analysis In Determining The Relevant Parcel As Have Other State Court And Lower Federal Courts

In this case, in order to determine the relevant parcel, the Massachusetts Supreme Judicial Court undertook a fact-based, case-specific inquiry of the very same factors identified by the state and federal circuit cases discussed above. Pet. App. A-9-15. Recognizing that the "[d]efinition of the relevant parcel, like the rest of the regulatory takings law, is a fact sensitive inquiry," the lower court looked to "factors that 'identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.'" Pet. App. A-9-10 (quoting *Ciampitti*, *supra* at 319).

The court's starting point was to presume that contiguous property held by the same owner would be aggregated. Pet. App. A-10. From here, the court considered "a wide array of other factors," including:

> whether the property is divided by a road; whether property was acquired at the same time; whether the purchase and financing of parcels were linked; the timing of the development; whether the land is put to the same or different uses; whether the owner intended to or actually did use the property as one economic unit; and the treatment of the property under State law.

Pet. App. A-11-12 (citations omitted), A-16-17. The lower court also stated that it considered "an owner's intended use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause." Pet. App. A-13. The court further stated that "[t]reatment of the property under State or local law is a relevant factor, but one with limited weight." Pet. App. A-14. This analysis is consistent with that conducted by other state courts and the federal circuit courts, wherein the court analyzes and weighs facts according to the particular facts and circumstances of the case.

The lower court determined that where there is contiguous, commonly-owned property, this "gives rise to a rebuttable presumption defining the relevant parcel." Pet. App. A-12. However, the court was careful to note that the "definition of the relevant parcel is a fact sensitive inquiry, and we do not propose a bright-line rule here. This presumption in favor of contiguity may be overcome to either increase or decrease the size of the parcel by the application of additional factors, including those described above." Pet. App. A-13.

The lower court noted that "[w]hile few courts explicitly employ this presumption in favor of contiguous commonly-owned property, we believe that the analysis used by many courts follows this pattern." Pet. App. A-15. As can be seen above in the brief synopsis of takings cases

from other states and federal circuit courts, this statement is accurate; the Supreme Judicial Court's analysis in this case is consistent with the analysis employed by other state and federal circuit courts, all of which are guided by this Court's regulatory taking cases, discussed *supra*. The Petitioner is incorrect in asserting that there is a conflict among the state courts.

II. THE PRESENT CASE, IN ANY EVENT, IS NOT AN APPROPRIATE CASE FOR THIS COURT TO FURTHER ADDRESS THE ISSUE OF DETERMINING THE RELEVANT PARCEL IN TAKINGS CASES

The factual circumstances of this case do not make it an appropriate vehicle for this Court to further address issues of the relevant parcel in takings cases. The Petitioner's claim is that the lower court erred in combining Lot 1 and Lot 2 for its takings analysis. However, even if this Court were to agree with that premise, the Petitioner nonetheless would have no recovery under this Court's rule set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the record below indicates that Petitioner would have no recovery even had the court applied the *Penn Central* analysis to Lot 1 exclusively.

In *Lucas*, this Court established a limited exception to the use of the *Penn Central* factors in the "extraordinary circumstance when no productive or economically beneficial use of land is permitted." *Lucas*, 505 U.S. at 1017. This categorical rule is limited to rare situations when the regulation causes the owner to "sacrifice *all* economically beneficial uses." *Id.* at 1018, 1019. This Court has since said that the *Lucas* rule would not apply even if "the diminution in value were 95% instead of 100%." *Tahoe*, 535 U.S. at 330.

As the lower court noted, the Petitioner's claim that if a takings analysis is done as to Lot 1 in isolation, a categorical taking will be found, is erroneous. After the Petitioner sold Lot 2, he hired an appraiser to value Lot 1. That appraiser did determine that Lot 1, by itself, had no value. However, the appraiser also determined that Lot 1 would have value to an abutter were it not for the tax liability which the town was imposing. "The tax liability was based on the town assessor's determination that lot 1 was developable. Of course, the town may not continue to tax lot 1 as developable land while simultaneously denying any opportunity to build on it. The appraiser concluded that should lot 1 be reassessed as an undevelopable lot, it would have a value of between $3,000 and $8,000 to an abutter." Pet. App. A-5 n.3. Because the land was not rendered economically valueless, there can be no categorical taking.

Finally, even a cursory review of the lower court's *Penn Central* analysis as to Lots 1 and 2 indicates that the same outcome would result for the Petitioner even had the court conducted such analysis as to Lot 1 exclusively. The lower court noted that the Petitioner had no reasonable investment-backed expectations whatsoever, having purchased a lot of land for $130,000 under the mistaken belief that he had acquired only one buildable lot, and having invested nothing beyond this upon the discovery that he actually had acquired two lots. Pet. App. A-18. The lower court's analysis regarding diminution in property value indicates that there was a diminution in value, Lot 1 having been assessed at $132,800 prior to the town's denial of a permit. Pet. App. A-19. However, as the Petitioner's own appraiser concluded, Lot 1 has not been rendered valueless, and more importantly, diminution in

property value alone cannot establish a taking. *Penn Central*, 438 U.S. at 131.

Finally, the lower court concluded that the character of the regulation in this case is not like a physical invasion, does not unfairly single out Petitioner, and is limited to mitigating harms or nuisances, all factors favoring a finding that there was no taking in this case. Pet. App. A-19-20. None of these findings would differ were this analysis to be conducted as to Lot 1 singly, rather than Lots 1 and 2 combined. In short, Petitioner's arguments to the effect that the lower court improperly analyzed the question of relevant parcel are rendered irrelevant by the facts of this case, because there is no taking regardless.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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